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SUPREME COURT, U.S.

No. 443

WILLIAM ANDERSON, et al.,
Petitioners,

v.

CITY OF CHESTER, PENNA.

WILLIAM ANDERSON, et al.,
Petitioners,

v.

COMMONWEALTH OF PENNA.

COMMONWEALTH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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COMMONWEALTH OF PENNA.

COMMONWEALTH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. QUESTIONS PRESENTED.

1. Did the Court of Appeals err in holding that petitioners' petitions for removal of criminal cases pending in Pennsylvania state court failed to sustain federal removal jurisdiction under § 1443(1) of the Judicial Code, the equal civil rights removal statute, where the petitions alleged that petitioners were being prosecuted for acts in the exercise of their constitutionally protected freedom of speech to protest racial discrimination, that the state statutes underlying the prosecution were unconstitutional on their faces or as applied under the First and Fourteenth Amendments, and that the purpose and effect of the prosecutions were to repress constitutionally protected free speech and protest of racial discrimination, where no evidence has been presented to sustain the allegations or to establish denial in state court of equal civil rights under § 1443(1)?

2. Did the Court of Appeals err in holding that petitioners' petitions for removal of criminal cases pending in Pennsylvania state court failed to sustain federal jurisdiction under § 1443(2) of the Judicial Code, the equal civil rights removal statute, where the petitioners failed to allege or prove prosecution for acts under color of authority derived from any law providing for equal rights?

3. Is there a conflict in decisions as to removal under 1443(1) "denial" and 1443(2) "color of authority" in 2nd, 3rd and 5th Circuits?

II. ARGUMENT.

1. The Court of Appeals Did Not Err in Holding That Petitioners' Petitions for Removal of Criminal Cases Pending in Pennsylvania State Court Failed to Sustain Federal Removal Jurisdiction Under § 1443(1) of the Judicial Code, the Equal Civil Rights Removal Statute, Where the Petitions Alleged That Petitioners Were Being Prosecuted for Acts in the Exercise of Their Constitutionally Protected Freedom of Speech to Protest Racial Discrimination, That the State Statutes Underlying the Prosecution Were Unconstitutional on Their Faces or as Applied Under the First and Fourteenth Amendments, and That the Purpose and Effect of the Prosecutions Were to Repress Constitutionally Protected Free Speech and Protest of Racial Discrimination, Where No Evidence Has Been Presented to Sustain the Allegations or to Establish Denial in State Court of Equal Civil Rights Under § 1443(1).

The Commonwealth denies that petitioners were being prosecuted for acts in the exercise of their constitutionally protected first amendment right of freedom of speech to protest racial discrimination and disagrees with petitioners' version of the evidence in these cases. In the Commonwealth's view, the prosecutions were for riotous conduct, conduct that went beyond the range of federally protected first amendment rights. Of course, this will be one of the issues for the triers of fact, wherever the cases are tried.

However, the Commonwealth recognizes that for the purposes of argument on removal, it will assume petitioners' recital of the facts as true, and moves to the questions going to alleged ground for removal jurisdiction.

However, as to allegations justifying removal, they must be proved if challenged. And they were not proven

in the case at bar. *Peacock v. Greenwood, Mississippi,* (5th Cir.) 347 F. 2d 679 (June 22, 1965).

I. Denial by State Court.

A. *Petitioners have not shown and cannot show that the statutes are being discriminatorily applied.*

Peacock v. Greenwood, Mississippi, (5th Cir) *supra,* and *Rachel v. Georgia,* (5th Cir.) 342 F. 2d 336 (March 5, 1965), are notable for enlarging denial of rights by state statute, formerly restricted by *Virginia v. Rives,* 100 U. S. 313 (1870). The Commonwealth, for the purpose of this argument, accepts this liberalization of "denial" under § 1443(1).

In *Peacock,* an obstructing of public streets statute, valid on its face, was discriminatorily applied to thwart civil rights workers' efforts to assist negroes in registering to vote.

In *Rachel,* it was clearly demonstrated that anti-trespass statutes were discriminatorily applied against sit-ins on account of race. This case is before Your Honorable Court, No. 147, on certiorari.

In *Cox v. State,* (5th Cir.) 348 F. 2d 750 (June 29, 1965), removal was permitted based on a clear example of harassment within the interdiction of § 1443(1).

In the *Cox v. State, supra,* case, in which removal was granted, prosecution was brought a second time for attempt after the U. S. Supreme Court reversed a conviction of a negro civil rights demonstrator for obstruction of justice based on court house picketing in *Cox v. State,* 85 S. Ct. 453, 476 (Jan. 18, 1965). The second prosecution was based on the same picketing. The defendants having been acquitted, the second prosecution would necessarily fail and was clearly harassment under § 1443(1).

In *Hutchinson v. People of New York,* 86 Supreme Court 5 (September 20, 1965), an application for a stay of a

remand order pending appeal to the Court of Appeals for the 2nd Circuit on certain criminal charges against petitioners sought to be removed to federal courts was denied by Mr. Justice Harlan, where petitioners' showing that they could not receive a fair and proper disposition of their federal claims in New York courts was insufficient.

Petitioners in the case at bar cannot bring it within *Rachel, Peacock,* or *Cox,* on the facts, but fall within *Hutchinson* above on the issue of § 1443(1).

B. *Petitioners have not shown and cannot show that the statutes of Pennsylvania are invalid or discriminatory on their face.*

See *Virginia v. Rives, supra.*

II. Equal Civil Rights.

The first amendment right of freedom of speech is not an "equal civil right".

The cases of *Rachel v. Georgia, supra,* and *Dilworth v. Riner,* (5th Cir.) 343 F. 2d 226 (March 18, 1965), are not controlling and are distinguishable on the facts, as involving defendants' equal civil rights guaranteed by the Civil Rights Act of 1964.

Rachel involved the enforcement of trespassing statutes against sit-ins on account of race.

Dilworth involved public accommodations, Title II of said Act. It held that the Civil Rights Act of 1964 immunizes from prosecution nonforcible attempts to gain admittance to or to remain in establishments covered by the Act.

It was recognized in the opinion of Judge Friendly in *People v. Galamison,* (2nd Cir.) 342 F. 2d 255 (Jan. 26, 1965), certiorari denied April 26, 1965, 85 Supreme Court 1342, that this right was embraced in the definition of equal civil rights.

The Commonwealth, for the purpose of this argument, agrees that conduct protected in *Rachel v. Georgia, supra,* and *Dilworth v. Riner, supra,* involved equal civil rights.

2. The Court of Appeals Did Not Err in Holding That Petitioners' Petitions for Removal of Criminal Cases Pending in Pennsylvania State Trial Courts Failed to Sustain Federal Jurisdiction Under § 1443(2) of the Judicial Code, the Equal Civil Rights Removal Statute, Where the Petitioners Failed to Allege or Prove Prosecution for Acts Under Color of Authority Derived From Any Law Providing for Equal Rights.

That petitioners' conduct was not an act under color of authority derived from any law providing for equal rights has been more than effectively answered by *People v. Galamison, supra,* 2nd Circuit, and *Peacock v. Greenwood, supra,* 5th Circuit.

In *People v. Galamison, supra,* the court held that a person claiming benefit of "color of authority" provision of civil rights removal statute must point to some law that directs or encourages him to act in a certain manner, not merely to generalized constitutional provision that will give him defenses or to equally general statute that may impose civil or criminal liability on persons interfering with with him.

This was also the holding in *Peacock v. Greenwood, supra.* The court held that claim by workers in Mississippi negro voter registration drive that they were being prosecuted for acts committed under color of authority of equal protection clauses and civil rights act of 1866 does not state cause for removal under § 1443(2) of Judicial Code since color of authority as used in that section is limited to federal officers and those assisting them were otherwise acting in official or quasi official capacity.

In *State of Arkansas v. Howard,* 218 F. Supp. 626 E.D. Ark., 1963, the court held that a person not a party

to a school integration suit was not acting under color of authority in transporting two negro children home from school.

The case at bar relied on *Galamison* on "color of authority".

3. There Is No Conflict in Decisions as to removal Under § 1443(1) "Denial" or § 1443(2) "Color of Authority" in 2nd, 3rd and 5th Circuits.

Petitioners cannot bring the 3rd circuit decision in the case at bar within considerations of Supreme Court Rule 19 governing review on certiorari.

Petitioners claim that *People v. Galamison, supra,* 2nd Cir. on the one part, and *Rachel v. Georgia, supra, Peacock v. Greenwood, supra,* and *Cox v. State, supra,* on the other part, of the 5th circuit, are conflicting.

With respect to § 1443(2) or "color of authority" there is no conflict whatsoever. *Peacock,* 5th circuit in fact is in harmony with *Galamison,* 2nd circuit on "color of authority".

With respect to § 1443(1) the "denial" cases, there is no conflict as the cases are distinguishable on the facts.

Rachel and *Peacock,* 5th circuit, squarely hold that the Civil Rights Act of 1964, public accommodations section, Title II, is a law providing for equal civil rights with which *Galamison,* 2nd circuit, is not in conflict.

Further, *Rachel* and *Peacock* applied statutes discriminatorily. Until such a set of facts arises in the 3rd circuit on removal, there is no need to speculate as to the result.

Cox, of course, is clearly a case of harassment, and removal did not rest on denial of first amendment right of racial protest, but on the basis of the previous acquittal. The defense in the first prosecution was the first amendment right and the conviction was reversed on that ground by the U. S. Supreme Court.

The petitioners here may well succeed in claiming as a defense that their conduct was constitutionally protected as a first amendment right, but this does not give them grounds for removal.

Respectfully submitted,

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